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In The
Supreme Court Of The United States
October Term, 1996

STATE OF CONNECTICUT, ET AL.
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~SECOND CIRCUIT~~

PETITION FOR WRIT OF CERTIORARI

Petitioners:

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QUESTIONS PRESENTED

1. Is a post judgment finding of contempt, including the imposition of the sanction of appointment of a special master, an appealable final decision under 28 U.S.C. § 1291?

2. Is a post judgment finding of contempt, including the imposition of the sanction of appointment of a special master, appealable under the collateral order doctrine?

LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the plaintiff was the United States of America.

The defendants in both courts below were the State of Connecticut; John G. Rowland, Governor, State of Connecticut; Connecticut Department of Mental Retardation; Peter H. O'Meara, Commissioner, Department of Mental Retardation; and Charles Hamad, Director, Southbury Training School. Each is a petitioner here and are referred to collectively as the "State of Connecticut."

Pursuant to Supreme Court Rule 35.3, notice is given that Governor John G. Rowland is the successor in office to William A. O'Neill; Commissioner Peter H. O'Meara is the successor in office to Brian Lensink; and Charles Hamad is the successor in office to Robert Griffith.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CONNECTICUT et al.

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, State of Connecticut; John G. Rowland, Governor, State of Connecticut; Connecticut Department of Mental Retardation; Peter H. O'Meara, Commissioner, Department of Mental Retardation; and Charles Hamad, Director, Southbury Training School, pray that a writ of certiorari issue to review the summary order of the United States Court of Appeals for the Second Circuit entered on June 13, 1997.

OPINIONS OF THE COURTS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is reported at *United States* v. *State of Connecticut*, 116 F.3d 466 (2d Cir. 1997), and is printed in the appendix to this petition at App. A1.

The memorandum of decision of the United States District Court for the District of Connecticut, Burns, J., of June 19, 1996 is reported at *United States* v. *State of Connecticut*, 931 F. Supp. 974 (D. Conn. 1996), and is printed in the Appendix at A6.

JURISDICTION

The summary order and opinion of the United States Court of Appeals for the Second Circuit was made and entered on June 13, 1997, a copy of which is printed in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1281(1). This petition is filed within ninety days of the order issued by the Court of Appeals on June 13, 1997. Supreme Court Rule 13.1; 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provision: 28 U.S.C. § 1291. Pursuant to Supreme Court Rule 14.1(f), the text of that provision is set forth at App. A42.

STATEMENT OF THE CASE

This petition arises out of an action brought by the United States under the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997 et seq., to address allegedly unconstitutional conditions at the Southbury Training School ("STS"), a state operated residential facility for persons with mental retardation. Jurisdiction of the federal court was invoked under 28 U.S.C. § 1345.

The United States brought this action in July, 1986. Simultaneous to the filing of the complaint, the parties filed a negotiated Consent Decree, which was approved by the District Court and judgment entered on December 22, 1986. The Consent Decree addresses conditions at STS, including staffing ratios and required policies and procedures for the operation of the facility.

The State of Connecticut subsequently prepared and submitted a Consent Decree Implementation Plan and several amendments to that plan, which were ultimately acceptable to the plaintiff and approved by the Court. A motion by the State of Connecticut to modify the Consent Decree, with the consent of the plaintiff, was granted by the District Court in August, 1987. A Stipulation filed jointly by the parties was approved by the District Court in July, 1988. Two additional stipulations were approved by the District Court in April, 1990 and December, 1991, respectively. The District Court has referred to the Consent Decree, Implementation Plan, and the latter two stipulations as the "Remedial Orders."

On April 17, 1995, the United States filed an Application for Order to Show Cause Why Defendants Should Not Be Held In Contempt. Following a four-day hearing in August, 1995, the District Court found that the State of Connecticut was in contempt of the Remedial Orders and appointed a special master. The District Court held:

> The Special Master shall take the following actions: (1) conduct an immediate and thorough review of all aspects of STS's care and treatment of residents covered by the Remedial Orders to determine the changes needed to meet the Orders' desired ends; (2) formulate specific methods to implement the required changes; and (3) work with the parties to effectuate those changes.

App. at A31. [1/] The decision was entered accordingly on June 19, 1996.

The special master has sweeping authority under the District Court's order and will be heavily involved in the day-to-day operation and management of STS. App. at A33. Moreover, the State of Connecticut is responsible for paying the costs incurred by the special master. Finally, the United States below conceded that the imposition of a special master is an imposition of a sanction in this case and eschewed seeking monetary civil penalties because the imposition of the special master was sanction enough.

On August 14, 1996, the State of Connecticut appealed to the United States Court of Appeals for the Second Circuit from the judgment of contempt and the imposition of the sanction of a special master. The United States, in its brief on the merits, asserted that the appeal should be dismissed because the judgment of the trial court was not a final order under 28 U.S.C. § 1291. The United States also argued that the District Court's June 19, 1996 decision did not qualify as an appealable interlocutory order under 28 U.S.C. § 1292(a)(1).

In a summary order, the Court of Appeals dismissed the appeal holding that the decision of the District Court was not an appealable final decision. The Court of Appeals reasoned that a finding of contempt, unaccompanied by the imposition of sanctions, is not a final decision. The Court also relied on the general principle that an order referring a case to a special master is not a final appealable order under 28 U.S.C. § 1291. Finally, without analysis, the Court also

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[1/] The District Court ordered that the parties subsequently submit their recommendations as to the identity of the special master. Following that submission, the identity of the special master was determined on July 15, 1997. The special master began his work in this case immediately thereafter.

rejected the State of Connecticut's assertion that, even if the decision were not a final decision under 28 U.S.C. § 1291, it constituted an appealable interlocutory order under the collateral order doctrine.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION BELOW RAISES SERIOUS AND IMPORTANT ISSUES REGARDING FEDERAL COURT INTRUSIONS ON STATE SOVEREIGNTY WITHOUT TIMELY AND MEANINGFUL APPELLATE REVIEW.

The Court should grant this Writ because the decision of the Court of Appeals raises serious and important issues regarding federal court intrusions on state sovereignty without providing the State timely and meaningful appellate review.

This Court has long recognized that "considerations based on the allocation of powers within our federal system . . . require that the district court defer to local government administrators who have the primary responsibility for elucidating, assessing, and solving the problems of institutional reform, to resolve the intricacies of implementing a decree modification." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992). In a related context, this Court has been highly critical of the appointment of a special master to devise remedial plans rather than allowing state officials the opportunity to cure ongoing problems at

state institutions. *Lewis* v. *Casey*, 116 S.Ct. 2174, 2185-86 (1996).

In the present case, through its decision to appoint a special master, the District Court has embarked on a remedial plan that will be highly intrusive on state sovereignty and the ability of state officials to exercise their wide discretion, within constitutional bounds, in operating a state institution. In essence, the appointment of the special master in this case constitutes a federal takeover of a state institution with the District Court, through a designee, micromanaging the operations of STS.

Without immediate and timely appellate review of its claim that the appointment of a special master is not warranted, the State will suffer irreparable harm that can never be remedied even if the State's position is later vindicated on appeal. The intrusion on state sovereignty is evidenced in the District Court's Order of Reference appointing the special master. App. at 33. The District Court has mandated that the special master is to "develop specific and measurable criteria" for the operation of STS. He is granted "complete and unrestricted access" to the facilities, offices, and files of STS; he is granted the "authority to attend any formal institutional meetings or proceedings" at STS; and he is granted the right to "review and comment on [all] documents, plans, policies and procedures" relevant to the operation of STS.[2/] *Id.*

Moreover, the State is ordered to pay the special master's fee for carrying out his duties. It is plain that the appointment of the special master under these circumstances constitutes an extreme intrusion on the State's discretion and expertise in operating STS. Indeed, this Court

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[2/] It is significant to note that the appointment of a special master was not agreed to as an appropriate obligation in the negotiated Consent Decree.

recently reiterated that such micromanagement of a state institution by a federally appointed special master is inappropriate. *See Lewis v. Casey*, 116 S.Ct. at 2185-86.

The United States argued in the Court of Appeals that the State is not entitled to appellate review of the adjudication of contempt and the appointment of a special master until all of the following has occurred: (1) the identity of the special master has been determined; (2) the special master has engaged in a "significant factual inquiry"; (3) the special master has made recommendations to the District Court; (4) the parties have had an opportunity to object to the findings of the special master; **and** (5) the District Court enters those recommendations as an order of the Court. Appellee's Brief at 28.[3/]

This scenario actually demonstrates the strength of the State of Connecticut's position quite well. Under that theory, by the time the Court of Appeals is authorized to review the District Court's appointment of the special master, the improper intrusion on the State's sovereign functions will have occurred long ago. The Court of Appeals could grant no appellate relief at that time to remedy the harm to the State caused by the Special Master's intrusion into its affairs.

Thus, the decision of the Court of Appeals, which countenances unreviewable intrusions on state sovereignty by federal district courts, raises significant and weighty questions regarding principles of federalism and comity and ignores the irreparable impact of the District Court's order

[3/] In this case, it is unclear whether, based on the recommendations of the special master, the District Court will grant any additional remedial relief from which the State of Connecticut may wish to appeal. Regardless of whether additional remedial relief is ordered, the State nevertheless is seriously aggrieved by the decision itself to appoint a special master.

on the State of Connecticut. The importance of these principles, both in the context of this case and others like it that will surely arise,[4/] warrant granting the petition for writ of certiorari.

II. THE UNITED STATES COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

Certiorari should be granted in this case because the United States Court of Appeals for the Second Circuit has rendered a decision in conflict with decisions of this Court and with other Courts of Appeals in a number of ways.

[4/] Special masters are often used in a variety of contexts in institutional reform litigation brought against state or local governments. *See, e.g., Lewis v. Casey,* 116 S.Ct. 2174 (1996) (District Court appointed special master to formulate plan to improve state prisoner access to prison law library); *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984) (District Court appointed special master to supervise reform of state institution for the care of the mentally retarded); *Brennan v. Armstrong*, 433 U.S 672 (1977) (District Court appointed special master to supervise desegregation of state school system).

A. Other Courts of Appeals permit an immediate appeal from a wide variety of postjudgment orders.

A final judgment was entered into in this case on December 22, 1986. Thus, there is no dispute that the contempt proceedings from which the State of Connecticut appeals are postjudgment proceedings. *See, e.g., Stone* v. *City and County of San Francisco*, 968 F.2d 850, 854 (9th Cir. 1991), *cert. denied*, 506 U.S. 1081 (1993) ("A consent decree is considered a final judgment despite the fact that the district court retains jurisdiction over the case.").

This Court has long held that an appeal should be permitted to review the trial court's decisions on important questions that arise after final judgment has entered. *In re Farmers' Loan & Trust Co.*, 129 U.S. 206, 266 (1889). As stated in that case:

> [T]he doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties . . . , there subsequently may arise important matters requiring the judicial action of the court in relation to the same property, and some of the rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court.

Id. Indeed, this Court has counseled a practical rather than technical interpretation of 28 U.S.C. § 1291 in determining what constitutes an appealable final decision. *Firestone*

Tire & Rubber Co. v. *Risjord*, 449 U.S. 368, 374 (1981).[5/] The reasoning of these cases has been consistently applied to determine that an appeal may lie from a wide variety of postjudgment orders. *See Wright, Miller and Cooper*, Federal Practice and Procedure: Jurisdiction 2d § 3916 at 351 and cases cited therein.

The decision of the Court of Appeals denying the State a meaningful and timely appeal from the District Court's postjudgment adjudication of contempt and appointment of a special master is in conflict with this reasoning as applied in numerous decisions of other Courts of Appeals regarding the appealability of postjudgment orders. For example, the Ninth Circuit has held that additional decrees entered to effect the purposes of an earlier judgment are themselves final and appealable. *Kittitas Reclamation Dist.* v. *Sunnyside Irrigation Dist.*, 763 F.2d 1032, 1034, n. 1 (9th Cir. 1985), *cert. denied,* 474 U.S. 1032 (1985). The Eighth Circuit has held that an order interpreting obligations under a consent decree are final and appealable even where the District Court retains jurisdiction to monitor compliance with a consent decree. *Walker* v. *United States Dept. of Housing and Urban Dev.*, 912 F.2d 819, 825, 826 (5th Cir. 1990).[6/] This Court should grant certiorari to resolve this conflict.

[5/] The most important concerns in determining § 1291 finality are "the inconvenience of piecemeal review on one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). In the present case, allowing an immediate appeal from the adjudication of contempt and appointment of a special master does not encourage piecemeal litigation because on-going compliance proceedings may continue without a special master and delaying appellate review of the appointment would be highly unjust and damaging to the State of Connecticut.

[6/] Similarly, the Tenth Circuit has recognized that

B. A postjudgment finding of contempt accompanied by the imposition of sanctions is an appealable final decision within 28 U.S.C. § 1291.

The decision of the Court of Appeals in this case also conflicts with decisions from other circuits in a more fundamental way. It is well established that a post-judgment adjudication of contempt that includes the imposition of sanctions is an appealable final decision under 28 U.S.C. § 1291.[7/] *See, e.g., Harris* v. *City of Philadelphia*, 47 F.3d 1333, 1337 (3d Cir. 1995); *Stone*, 968 F.2d at 854 ("A post-judgment order imposing sanctions acquires the operativeness and consequence required for finality under § 1291."); *Davies* v. *Grossmont Union High School Dist.*, 930 F.2d 1390, 1393-94 (9th Cir. 1991), *cert. denied*, 501 U.S. 1252 (1991). Consequently, the Court of Appeals decision directly conflicts with numerous decisions by other Courts of Appeals that have permitted appeals from the imposition of sanctions following a post-judgment adjudication of contempt.

In the present case, the Court of Appeals, without analysis, erroneously concluded that no sanction was

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post-judgment orders are appealable particularly where they would otherwise be unreviewable. *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1474 (10th Cir. 1993) (denial of motion to supplement the record was final decision within 28 U.S.C. § 1291).

7/ Because this is a postjudgment proceeding, this case does not fall into the class of cases in which the appeal of an order of contempt and imposition of sanctions must await an appeal on the merits of the judgment. *Wright, Miller & Cooper*, Federal Practice and Procedure: Jurisdiction 2d § 3917 at 376 and cases cited therein.

imposed by the trial court's decision. The Court of Appeals, however, failed to take into account the highly intrusive and burdensome nature of the appointment of a special master; *see Lewis* v. *Casey*, 116 S.Ct. at 2185-86; including the fiscal cost to the State of Connecticut. *See generally* Part I. Indeed, the Court of Appeals' own characterization of the appointment stands in stark contrast to the United States' characterization of the proposed appointment during the contempt proceedings as a "sanction." *See* United States' Memorandum of Law in Support of Its Application to Show Cause at 33.

The Court of Appeals and the United States also relied on cases holding that "an order referring a case to a special master is not a final order appealable under 28 U.S.C. § 1291." *Grilli* v. *Metropolitan Life Ins. Co.*, 78 F.3d 1533, 1538 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 608 (1996); *see also Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290-91 & n.4 (1940). These cases are inapposite because none of them involves circumstances where the referral to the special master constituted an imposition of a sanction by the District Court following an adjudication of contempt. Moreover, none of the cases cited involves litigation against a State with the potential for intrusion on principles of state sovereignty and federalism.

Consequently, because the appointment of a special master was a contempt sanction, the Court of Appeals' decision denying an appeal here conflicts with the decisions of other Courts of Appeals that hold that a postjudgment adjudication of contempt is an appealable final decision. This Court should grant the petition to resolve this conflict.

C. The District Court's order is an appealable collateral order.

Even if the adjudication of contempt and the appointment of a special master does not constitute a final decision under 28 U.S.C. § 1291, the decision of the District Court is immediately appealable under the *Cohen* collateral order doctrine. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). In *Cohen*, this Court recognized that some decisions "fall into that small class [of decisions] which finally determine claims of right separable from and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*

As noted in the previous section, the State of Connecticut seeks to avoid a significant intrusion on its sovereignty caused by the appointment of a special master. This intrusion will occur unless the State may seek immediate relief from the Court of Appeals. The asserted right to be free from that intrusion will be forever lost if the State may not appeal until the District Court has adopted a finding or recommendation of the special master. Consequently, the decision to appoint a special master will be effectively unreviewable once the proceedings below are concluded.

This Court has stressed, in related contexts, the "importance of ensuring that the States' dignitary interests can be fully vindicated" by permitting States an opportunity to appeal immediately orders that intrude on those interests. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). For example, in *Puerto Rico Aqueduct,* this Court recognized that a State must be permitted to appeal immediately, pursuant to the collateral order doctrine, the denial of a motion to dismiss that is

based upon the State's Eleventh Amendment immunity from suit. *Cf. Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982). In the present case, as in *Puerto Rico Aqueduct*, the State of Connecticut's interest in avoiding a significant intrusion on its sovereignty will be irretrievably lost without an immediate appeal. Thus, the present case falls squarely within the four corners of the collateral order doctrine.

D. Concepts of finality must be applied more broadly in the context of institutional reform litigation.

Finally, the decision of the Court of Appeals is also contrary to the widely recognized need for a more flexible approach to notions of finality in the context of institutional reform litigation. Institutional reform litigation frequently requires that jurisdiction be retained long after the basic determination of liability.[8/] Just as an appeal should be available from successive remedial orders, so should an appeal be available from a finding of contempt when circumstances make it uncertain whether any further orders will be required. In fact, in prior cases the Second Circuit itself has cited the need to interpret the statutes governing finality more broadly in complex cases involving lengthy post-

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[8/] A court determined to reform a complex social institution may be compelled to retain jurisdiction for many years, entering many orders after the initial determination that reform is required. Such orders may also be appealed as the equivalent of injunctive orders. *See, e.g, United States* v. *International Brotherhood of Teamsters*, 905 F.2d 610, 616 (2d Cir. 1990)(an order implementing a long-term consent decree could be appealed as an interlocutory injunctive order); *Sansom Committee* v. *Lynn*, 735 F.2d 1552, 1553 (3d Cir. 1984)(same).

judgment proceedings. For example, in *Yonkers Board of Education*, the Second Circuit held that in "cases involving a protracted remedial phase, we must give §1291 a practical rather than technical construction." *United States* v. *Yonkers Board of Education*, 946 F.2d 180, 183 (2d Cir. 1991). Similarly, in *United States* v. *International Brotherhood of Teamsters*, 931 F.2d 177, 182-183 (2d Cir. 1991), the Court of Appeals recognized the need for flexibility in considering post-judgment appeals in cases involving complex consent decrees:

> The administration of complex consent decrees such as the present one gives rise to issues of appellate review that differ from those in ordinary litigation . . . . [R]ulings in the course of administering a consent decree concern implementation of the judgment itself, and often require intermediate acts by the parties that may be unreviewable if appeals are delayed until compliance is final. A flexible approach is thus necessary, similar to that applied in reviewing bankruptcy decisions.

Id.

In this case, a complex institutional reform action, the State of Connecticut should be granted the meaningful and timely right to challenge a postjudgment order to protect a right that will be irretrievably lost if such an appeal is not permitted.

III. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO PROVIDE THE LOWER FEDERAL COURTS WITH GUIDANCE ON THE SIGNIFICANT QUESTIONS OF JURISDICTION AND PROCEDURE RAISED BY THIS CASE.

Certiorari should be granted in this case because it involves an important question of federal jurisdiction, practice and procedure regarding which guidance by this Court is warranted, pursuant to this Court's responsibility for exercising supervisory authority over the federal judiciary. This Court frequently has exercised its supervisory authority to review cases in which an important, novel, or difficult issue of federal court jurisdiction or procedure was dispositive. *See, e.g., Calloway v. Benton,* 336 U.S. 132 (1949) (addressing ability of bankruptcy court to assume jurisdiction over particular question already in litigation in state court); *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947) (addressing ability of District Court to dismiss a case on grounds of *forum non conveniens*); *see also* Supreme Court Rule 10(a) (petition for certiorari may be granted where "a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of [the Supreme Court's] supervisory power").

Specifically, this Court should review the determination by the Second Circuit that a finding of contempt *combined with* the appointment of a special master does not constitute, under the circumstances of this case, either an appealable final decision under 28 U.S.C. § 1291 or an appealable collateral order. The flaws in the Second Circuit's

summary opinion arise from the lack of clear guidance as to how to analyze the appealability of such a decision.

For example, in discussing whether the District Court's order constituted a final judgment for § 1291 purposes, the Second Circuit relied upon factually and legally inapposite cases. The court first cited *Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 17 (2d Cir. 1992), to support the proposition that "a finding of contempt unaccompanied by sanctions is not final and thus cannot support an appeal." App. at A4. Although this may be accurate as a general statement of law, it is inapplicable to the present case, where, as discussed previously, the appointment of a special master *was* an imposition of a sanction. Moreover, whereas the *Dove* contempt finding arose in the context of a prejudgment discovery order; *Dove v. Atlantic Capital Corp., 963* F.2d at 16-17; the present contempt finding arose from a postjudgment Application for Order to Show Cause in a case involving implementation of a complex consent decree. This difference in timing and nature of the cases should have a substantial effect on the reviewability of orders entered during the litigation. *See, e.g., United States v. International Brotherhood of Teamsters,* 931 F.2d 177, 182-83 (2d Cir. 1992).

The Second Circuit also relied upon *Grilli v. Metropolitan Life Ins. Co.*, 78 F.3d 1533, 1538 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 608 (1996), for the principle that "[a]n order referring a matter to a special master is not a final order appealable under 28 U.S.C. § 1291." App. at A4. Again, although this may be accurate as a general statement of law, it is inapplicable to the present case, where the appointment was imposed on the State as a sanction in a postjudgment contempt proceeding.

As discussed in Part II of this Petition, however, the doctrinal foundations underlying a number of decisions

from other Circuits dictate a result different from that reached by the Second Circuit in the present case. This Court should therefore exercise its supervisory authority to provide guidance to the lower federal courts regarding the immediate appealability of an adjudication of contempt and the appointment of a special master in a case in which a State's sovereign rights are at stake. Such guidance is especially appropriate in light of the potentially serious intrusions on state sovereignty that would be left unreviewable if the Court of Appeals' decision is not reversed.

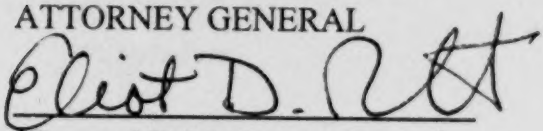
CONCLUSION

For all of the foregoing reasons, the petitioners assert that a writ of certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

STATE OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL



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No. _____

In The

Supreme Court Of The United States

October Term, 1996

STATE OF CONNECTICUT, ET AL.
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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D CONN
86-cv-252
Burns

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED) TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of June, one thousand nine hundred and ninety-seven.

PRESENT: HON. FRANK X. ALTIMARI
HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-V-

No. 96-6218

STATE OF CONNECTICUT; WILLIAM A. O'NEILL, Governor State of Connecticut; DEPT. OF MENTAL RETARDATION; BRIAN LENSINK, Commissioner, Dept. of Mental Retardation; ROBERT GRIFFITH, Director, Southbury Training School,

Defendants-Appellants,

SOUTHBURY TRAINING SCHOOL, Home and School Association of Southbury Training School and Southbury Training School Foundation, Inc.,

Movant.

APPEARING FOR APPELLEE:
LOUIS E. PERAERTZ,

Washington, DC (Isabelle K. Pinzler, Acting Assistant Attorney General, Dennis J. Dimsey, Attorney, United States Department of Justice, of counsel)

APPEARING FOR APPELLANT:
JAMES P. WELSH, Assistant

Attorney General, Hartford, CT (Richard Blumenthal, Attorney General for the State of Connecticut, Bernard

F. McGovern, Jr. Assistant
Attorney General, of counsel).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut (Burns, J.), and was argued.

ON CONSIDERATION OF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal be and it hereby is dismissed for lack of appellate jurisdiction.

Defendants, the State of Connecticut and various state officials, appeal from a ruling of the United States District Court for the District of Connecticut finding defendants in civil contempt and stating the intent to appoint a special master. we dismiss the appeal for lack of appellate jurisdiction.

The United States initiated this action against the defendants in 1985 under the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, et seq.. The complaint sought to address and remedy the living conditions at the Southbury Training School, a Connecticut institution for persons with developmental disabilities.

The parties thereafter entered into a consent decree, which required the defendants to submit an implementation plan addressing the procedures by which the consent decree would be effectuated. The district court approved the plan in 1988, which was then modified by several stipulations filed by the parties in the late eighties. Two further stipulations and orders (primarily directed toward medical care at

Southbury) were approved by the court in 1990 and 1991 respectively. The consent decree, the implementation plan, and the two later stipulations and orders were referred to collectively by the district court as the "Remedial Orders."

In 1996, following an investigation and examination of the conditions at Southbury, the United States brought an application for an order to show cause why defendants should not be held in contempt. The district court held a four day hearing and in a ruling dated June 18, 1996, found the defendants in contempt the Remedial Orders and stated the court's intent to appoint special master to determine why Southbury's efforts are not producing the Remedial Orders' intended results, and to make recommendations tot he court. The district court imposed no sanctions and has not yet chosen a special master, apparently due to the pendency of this appeal.

We have jurisdiction to hear appeals of "final decisions" of the district courts. 28 U.S.C. § 1291. "[A] finding of contempt unaccompanied by sanctions is not final and thus cannot support an appeal." Dove v. Atlantic Capital Co., 963 F.2d 15,17 (2d Cir. 1992) (citing In re Irving, 600 F.2d 1027, 1031 n.1 (2d Cir. 1979); Comptone Co. v. Rayex Corp., 251 F.2d 487, 488 (2d Cir. 1958) (per curiam)). And "[a]n order referring a matter to a special master is not a final order appealable under 28 U.S.C. 1291. Grilli v. Metropolitan Life Ins. Co., 78 F.3d 1533, 1538 (11th Cir. 1996); see also Deckert v. Independence Shares Corp., 311 U.S. 282, 290-91 & n. 4 (1940).

It follows that the district court's ruling in this case -- finding defendants in contempt, imposing no sanctions, and stating the intent to appoint a special master--is not an

appealable final decision. Nor does the court's order qualify as an appealable order under the collateral order doctrine. Accordingly, this appeal is dismissed for lack of appellate jurisdiction.

FRANK X. ALTIMARI, U.S.C.J.

DENNIS JACOBS, U.S.C.J.

PIERRE N. LEVAL, U.S.C.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
PLAINTIFF :

V. : No. 3:86-CV-252 (EBB)

STATE OF CONNECTICUT, ET AL. :
DEFENDANTS

STATE OF CONNECTICUT, ET AL.
Defendants

RULING ON PLAINTIFF'S APPLICATION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CIVIL CONTEMPT

The Plaintiff United States of America has moved the court to declare the Defendant State of Connecticut officials in contempt of the Consent Decree dated December 22, 1986, and the Court Orders dated April 24, 1990 and December 9, 1991, respectively. For the reasons discussed below, the Plaintiff's motion is GRANTED.

I. BACKGROUND

On May 1, 1984, the United States Department of Justice (the "DOJ") notified Connecticut officials of the DOJ's intention to investigate the living conditions at

Southbury Training School ("STS")[1/] in accordance with the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997 et seq.[2/] On September 11, 1985, following its investigation, the Plaintiff brought an act against the State of Connecticut, its governor, the commissioner of the Department of Mental Retardation ("DMR"), and the director of STS, pursuant to CRIPA. In lieu of litigation, the United States and various Connecticut officials[3/] entered into a Consent Decree which this court so ordered on December 22, 1986.

The Consent Decree required the Defendants to submit an Implementation Plan (the "Plan") addressing the procedure they would use to implement the Consent Decree's mandates. This court approved the Plan on July 22, 1988. Subsequent to entering into the Consent Decree, the parties agreed to two additional Court Orders on April 24, 1990 (the "1990 Court Order") and December 9, 1991 (the "1991 Court Order"), respectively.[4/]

1/ STS is an institution for the mentally disabled in the state of Connecticut. As of the hearing on this motion, STS housed 843 residents, making it one of the ten largest institutions of its kind in the United States.

2/ CRIPA authorizes the Department of Justice to investigate institutions for the mentally disabled, if credible allegations of unconstitutional conditions of confinement exist.

3/ The Connecticut officials included: William A. O'Neill, Governor; Brian Lensink, Commissioner, Connecticut Department of Mental Retardation; Robert Griffith, Director, Southbury Training School; and Joseph I. Lieberman, Connecticut Attorney General.

4/ The court will refer to the Consent Decree, Plan, and two Court orders collectively as the "Remedial Orders."

In November, 1993, attorneys for the Civil Rights Division of the DOJ, along with various experts, examined STS's conditions. The DOJ's experts included: Dr. Renee C. Wachtel, M.D., Director of Developmental Pediatrics, and Associate Professor of Pediatrics at the University of Maryland School of Medicine; Dr. Alan E. Harchik, Ph.D.; and Ms. Susan Harryman, Director of the Physical Therapy Department at the Kennedy Krieger Institute, and Instructor in Department of Pediatrics at the John Hopkins University School of Medicine. All of the experts' findings indicated that STS was not complying with the Remedial orders. (See Pl. Exs. 4, 8, and 22.)

On June 20, 1994, the Plaintiff sent the experts' findings to the Defendants, together with a letter alleging that the Defendants were not in compliance with the Remedial orders. The Plaintiff also included a list of actions that the Defendants should take to remedy the alleged violations.

In response, the Defendants retained a group of experts to examine the Plaintiff's experts' findings, and to make independent findings and suggestions. The Defendants, experts included: Dr. Fred Volkmar, M.D., Professor of Child Psychology at the Yale University Child Study Center; Dr. Henry Schneiderman, M.D., F.A.C.P.; Dr. James E.C. Walker, M.D., Professor of Medicine, Emeritus, at the University of Connecticut; Ms. Rhea Sanford, R.N., M.S.N., Clinial Nurse Specialist at the John Dempsey Hospital of the University of Connecticut Health Center; and Ms. Karen Green McGowan, R.N., Clinical Nurse Consultant. After the Defendants' experts concluded their examination, counsel for the respective parties met to discuss a possible resolution of the Plaintiff's contempt allegations. The Plaintiff proposed two principle measures to remedy

the Defendants' alleged contempt: appointment of a Special Master to increase the level of monitoring of conditions at STS, and a significant reduction of STS's population within three years. Despite extensive discussions, the parties failed to reach an agreement.

Subsequently, the Plaintiff filed the instant application for an order to show cause why the Defendants should not be held in contempt. This court held four days of hearings on the Plaintiff's application, during which the Plaintiff presented expert testimony regarding the Defendants' alleged noncompliance; and the Defendants presented testimony from several of its employees.

II. DISCUSSION

A. LEGAL STANDARD

Courts have the inherent power to hold a party in civil contempt "to enforce compliance with an order of the court, or to compensate for losses or damages." Powell v. Ward, 643 F.2d 924, 931 (2d Cir. 1981) (quoting McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949)). Also, 18 U.S.C. § 401 gives federal courts the "power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . (3)) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

A finding of contempt is appropriate when: (1) the court order's provisions are clear and unambiguous; (2) the moving party establishes noncompliance by clear and convincing evidence; and (3) the defendant has not exercised reasonable diligence in, attempting to comply. International Longshoremen's Assn. v. Philadelphia Marine Trade Assn., 389 U.S. 64, 75-76 (1967); EEOC v. Local 631, 753

F.2d 1172, 1178 (2d Cir. 1985), aff'd. 478 U.S. 421 (1986). Furthermore, because sanctions for civil contempt are remedial in nature, a court may find a party in contempt, irrespective of whether that party intended to comply with the court's order. McComb v. Jacksonville Paper Co., 336 U.S. at 191; Manhattan Industries, Inc. v. Sweater Bee by Banff, LTD. 885 F.2d 1, 5 (2d Cir. 1989) (court declares that "sanctions for civil contempt can be imposed without a finding of willfulness.") (citations omitted).

B. FINDINGS OF NONCOMPLIANCE

At the hearing, and in its papers, the Plaintiff alleged that the Defendants were violating the Remedial orders in three areas: Psychological services, medical services, and physical therapy services. The court will address each of these areas in turn.

1. Psychological Services

Psychological services are critical to the residents' development at STS. The Remedial Orders set forth in detail numerous requirements regarding STS's psychological services. Among other things, STS is required to provide:

> Training programs professionally designed to reduce or eliminate unreasonable risks to personal safety or unreasonable use of restraints and developed by qualified professionals ...[5/]

[5/] The Remedial orders also mandate the following: Consent Decree § I(2) (requires provision of that degree of care which is sufficient to protect all residents from unreasonable risks to their personal safety both by the conduct of staff, and of other residents); Consent Decree § 1(4) (requires STS to prescribe and administer behavior modifying medications pursuant to the exercise of professional judgment); Consent Decree § V(3) (requires STS to provide a sufficient number of

Consent Decree § I(1). As shown in its compliance reports, STS has developed an overall plan of services ("OPS") for its residents, thereby complying with the letter of the Remedial Orders. However, STS fails to satisfy the spirit of the Remedial orders, as its implementation of the overall plan of services has not yielded the required results.

For example, STS has a written behavior plan for most of its residents, which, in part, requires psychology staff members to conduct behavior assessments to determine the possible conditions that both lead to and maintain challenging problem behaviors. Yet, STS's records show that assessments are not being performed regularly, and when they are performed, they rarely generate information or actions. At the hearing, and in his report, Dr. Harchik explained that many of the behavior assessments he reviewed were several months old, and identical rewrites of previously conducted analyses. (Pl. Ex. 22 at 6.) Further, he noted that the twenty-one cases he reviewed, there was little relation between the analyses and the treatment procedures. More specifically, described several cases in which the patients were either showing any progress or were regressing, but no further action taken.

STS's behavior plans also required staff members to implement an "ignore and redirect" procedure when confronted with maladaptive behavior. Yet, the plans did not

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training program hours for each resident); Consent Decree § V(S) (requires STS to maintain adequate records); Consent Decree § V(8) (requires that restraints and behavior modifying medications not be used in lieu of training programs); 1991 Court Order § l(A) (requires modification of training plans when necessary); and 1990 Court Order § l(u) (requires, when appropriate, "the Interdisciplinary Team, within 30 days of each review, [to] modify the existing overall Plan of Service of such residents in accordance with professional judgment of qualified professionals.").

specify whether the behavior or the resident should be ignored,, what the resident should be redirected to do, or what the staff should do if the behavior continued but restraint was not required. Consequently, "staff members always paid attention to residents when they exhibited problem behavior by making statements to the resident about the problem behavior. . . [but failed] to redirect them to something more appropriate or to engage in an alternative behavior or activity." (Id.)

A September, 1994 report on the death of Stanley B. shows clearly STS's delinquency in implementing treatment procedures to address problems discovered during behavior assessments. Stanley B. was one of STS's approximately twenty smoking residents. STS's staff was well aware that he was "a 'sloppy' and at times careless smoker who sometimes burned holes in his clothing."[6/] However, Stanley B.'s 1993 OPS did not provide any instruction to the staff regarding his smoking habits, or his need for supervision while smoking. (PI. Ex. 12, Final Investigation Report of Thomas Harmon at 9-10 [hereinafter "Harmon Report"].)

In 1989, STS staff developed an OPS for Stanley B. which established a goal to teach him to extinguish his pipe in a safe manner.[7/] To achieve that goal, he had to complete

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6/ In the past, Stanley B. f ailed to pay attention to the end of his cigarette, and hot ash would fall on, and burn, his clothing. Eventually, staff members limited his smoking to a pipe. Despite such limitation, Stanley B. was still careless in packing his pipe with tobacco, often spilling loose tobacco on the floor and his clothing. (Pl. Ex. 12, Final Investigation Report of Thomas Harmon at 9-10 (hereinafter "Harmon Report").)

7/ The goal entailed teaching Stanley B. to pack his pipe neatly, dump the pipe's hot ash in an ash-tray, place his pipe in a fire-proof container in his gym bag, and clean

a series of smoking-related tasks, independently, during eight consecutive training sessions. (Harmon Report at 11.) However, only two quarterly reports regarding this goal were found, neither of which indicated that Stanley B. was progressing. Moreover, although a later report indicated a slight decrease in his performance, STS staff did not take any action to address the problem.[8/]

On the morning of April 2, 1994, Stanley B.'s clothing caught on fire while he smoked his pipe. As a result, he suffered burns to one-half of his body, and died later that evening.

The Health Care Financing Administration's (the "HCFA")[9/] October, 1994 survey also evinces STS's inability to implement its programs effectively. In its report, the HCFA stated that its inspection indicated STS was not providing continuous, aggressive, and active treatment programs. (Pl. Ex. 19, HCFA Cottage 34 Survey at 1.) Furthermore, HCFA noted that its survey was the fourth consecutive survey to yield such results. HCFA then

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up after himself. (Harmon Report at 11.)

8/ When Mr. Harmon questioned STS officials about the termination of Stanley B. Is training, they reasoned that "it could have been realized that the goal was beyond achievement or that other needs were more important. The record, however, did not indicate why attempts to teach (Stanley B.) safesmoking habits were abandoned, or how his need to 'smoke safely' would otherwise be addressed" (Harmon Report at 12.)

9/ HCFA conducts periodic examinations of those facilities for the mentally disabled receiving federal funding.

discussed several instances in which pica programs[10/] for several clients were either lacking, or not being implemented as written at their day programs: (1) A staff interview indicated that Client #07 ingested a piece of plastic at her day site (Pl. Ex. 19, HCFA Cottage 32 Survey at 5); (2) during a one-hour observation, Client #09 was observed to ingest feathers from a duster, and lacked involvement in a routine (id.); (3) Client #08 lacked the implementation of the "eye-gouging" component of her behavior program at 6); (4) Staff observed Client #08 stick her finger in her eye, but did not redirect her to remove it as indicated in her behavior program; (5) observation and documentation indicated that Client #02's behavior program to reduce his self-injurious behavior of hitting his head with his hands was not implemented as written (Pl. Ex. 19, HCFA Cottage 34 Survey at 2); (6) a review of Client #06's behavior data since the implementation of his program designed to prevent incidents of ingesting cigarette butts indicated that Client #06 ingested cigarette butts at least seventy-eight times between June 17, 1994 and January 1, 1995 (Pl. Ex. 19, HCFA Colony Ct. Circle Survey at 2); (7) STS's failure to implement its procedure to keep toxic substances out of reach of the client resulted in Client #03 ingesting a water and bleach mixture (Pl. Ex. 19, HCFA Cottage 22 Survey at 2); and (8) although Client #02 fell three hundred and twenty-four times between January, 1994 and October, 1994, STS lacked programming to address this behavior. (Pl. Ex. 19, HCFA Cottage 34 Survey at 2.)

STS has not only failed to protect its residents from injury themselves, but has also failed to protect its residents from unreasonable risk of injury by other residents. A

[10/] Pica is an abnormal desire to ingest substances not normally eaten.

cursory review of STS's accident report for the year beginning September 1, 1993 reveals numerous incidents of residents' acts of aggression toward their peers.[11/] While the court acknowledges that a facility such as STS is not able to prevent every incident, the court notes that numerous incidents listed in STS's accident reports occurred on several occasions. (Pl. Ex. 20.)[12/]

The court, however, finds that STS's accident reports are,misleading, when viewed in isolation. When the court juxtaposes STS's reported and substantiated abuse and neglect allegations between 1992 and 1994 with those of the other institutions in the DMR's six regions, the court finds STS's number to be the lowest. (See, Def. Exs, AB and AC.) Of course, such a comparison does not exonerate STS from its duty to minimize accidents. However, STS appeared to be combating the problem more effectively than any of the other institutions in the region.

11/ For example: (1) A resident knocked Claire to the floor; (2) a resident pushed Karyn to the floor; (3) a resident punched Ray in the chest; (4) a resident hit Mary on the head; (5) Charlie punched a staff member in the back of his head; (6) a resident punched Judy in the eye; (7) A resident threw Alicia to the ground; and (8) a resident grabbed Brenda's head, and bit out a mouth full of hair. (Pl. Ex. 20.)

12/ For example: (1) A resident slapped Stella two times in two days; (2)James headlocked another resident on three separate occasions in one day; (3) a resident slapped Lillian D. on the head five times; (4) a resident head-butted Christine 0. three times; (5) a resident slapped David W. in the face two times; and (6) a resident slapped Richard W. in the face two times. (Pl. Ex. 20 and selected accident reports.)

Although positive reinforcement is one of the most effective, efficient, and nonaversive procedures available for dealing with such maladaptive behavior, it is not a standard part of STS's behavioral programs. Further, when STS did include positive reinforcement in a behavior plan, attempts by the psychology and direct-care staff to implement the procedure demonstrated a "total lack of understanding of positive reinforcement." (Pl. Ex. 22 at 7.) For example, the staff allowed one resident to perform preferred chores to reinforce appropriate behavior, and directed him to do the same chores when he became agitated. In another case, a resident, who was restrained at least once a day for exhibiting aggressive behavior, received his reinforcement snacks despite his disruptive conduct. Yet another resident's behavior plan called for reinforcement every of five minutes, but the staff member did not administer the procedure, reasoning that it does not work. "By not applying the simplest, most basic principles of intervention and positive reinforcement, residents at STS are not receiving a suitable training program."[13/] (PI. Ex. 22 at 7.)

Another flaw in STS's psychological services is its failure to keep its residents actively engaged. Dr. Harchik performed a study across eleven cottages to determine the number of residents engaged at any given time.[14/] He

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13/ Dr. Harchik also noted the conspicuous absence of positive staff interaction with the residents. He stated that he observed fifty staff members across eleven settings, and found only one interacting with the residents.

14/ Every ten to fifteen minutes Dr. Harchik would count systematically the number of residents who were engaged. Dr. Harchik's definition of "engagement" included any active participation in an activity (i.e., looking at magazines, eating dinner, and playing with

found that the residents were "almost never engaged." (Pl. Ex. 22 at 11.) In fact, the average percentage of residents engaged across the eleven cottages was 31%, an extremely low average by professional standards.[15/] Instead of engaging the residents in activities, staff members were observed watching TV, talking on the telephone, talking to each other, and engaging in other miscellaneous activities. (Pl. Ex. 22 at 11-13.)

STS has failed to discover and address such systemic defects, because its staff does not execute STS's "review and modify" procedures regularly. Once again, STS is in compliance with the letter of the Remedial Orders, but fails to produce the results. As dictated by the Remedial Orders, STS procedural guidelines require that its staff hold regular monthly reviews of behavior treatments for those residents receiving medication, and that a doctoral-level psychology staff conduct monthly reviews of specific behavior plans ("QA reviews"). Also, an interdisciplinary team is required to perform a quarterly review of all plan objectives. Furthermore, STS's Program Review Committee (the "PRC") is required to review those residents receiving behavior medications at least every two years. (Pl. Ex. 22 at 9.) However, while at least half of the behavior programs he reviewed required modification,[16/] the QA reviews performed prior to his report did not recommend

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toys). (Pl. Ex. 22 at 11-12.)

15/ Dr. Harchik stated that "80% or lower is considered to be problematic by professional standards." (PI. Ex. 22 at 12.)

16/ Dr. Harchik found that the patient's behavior was either worsening or not progressing.

modification of any existing behavior plans.[17] (PI. Ex. 22 at 9.)

Finally, the Defendants violate the Remedial Orders by administering behavioral medication in lieu of training programs. The Defendants' own expert found that STS administered psychotropic medications for behavior problems when behavioral programs were more appropriate. Dr. Fred Volkmar found that:

> Psychiatric services at STS appeared to be entirely focused on issues of medication . . . Essentially, there appear to be no psychiatric services other than those related to medications, e.g., no in-service training, no supervision, no psychotherapy, no consultation regarding psychiatric aspects of medical conditions, and so forth. Psychiatrists are not really active members of the treatment teams but rather are brought in as, in effect, outside consultants. The psychiatric consultations are not well integrated with other aspects of the rehabilitation and medical program.
>
> This has had the unintended effect of "marginalizing"psychiatry at STS with consequent implications for thequality of service which is provided.

Report of Dr. Fred R. Volkmar at 6 [hereinafter "Volkmar Report"].

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[17] Dr. Harchik stated that STS's 'clinical response to behaviors worsening appear(ed) to be to look to obtaining a better diagnosis...or changing medications.... There appears to be little focus upon modifying environmental conditions and intervention procedures." (Pl. Ex. 22 at 9.)

B. Medical Services

The Remedial orders require that STS provide adequate medical care to all of its residents.[18/] Several of the experts' reports STS compliance reports reveal that STS has established a substantial number of medical programs. However, clear and convincing evidence shows that the Defendants' medical services at times violate the Remedial orders' requirements, thereby placing residents in grave danger.

Perhaps the most blatant example of STS's-failure to provide adequate medical care is found in the various reports on the death of John T.[19/] In caring for John T., STS's

[18/] The Consent Decree provides in relevant part: § I(3) (adequate medical care shall be afforded all residents pursuant to the exercise of professional judgment by a qualified professional); § 1(4) (behavior modifying medications and other medications must be prescribed and administered to residents pursuant to the exercise of professional judgment by a qualified professional); and § V(5) (plan shall be established setting forth the record keeping systems, policies, and procedures with respect to each patient's care, medical treatment, and required training that shall be utilized to maintain and make available in each resident's record such information as is professionally necessary to permit the exercise of professional judgment in that resident's care, medical treatment, and training).

[19/] One report described STS's treatment of John T.'s medical condition as "plagued with medical flaws that may have contributed to precipitating his) death.... Upon return to STS in a debilitated but stable condition, John T.'s evaluation by his (primary care physician) failed to assess and address important aspects of his medical condition." Memorandum of Miguel Aquino at 3 [hereinafter "Aquino Memo"].

medical staff made a series of severe errors which possibly contributed to his ultimate death. Among those errors were the following: (1) STS staff's management of diarrhea and severe malnutrition in June, 1992 was delayed and inadequate;[20/] (2) John T.'s physician, one Dr. Guevarra, failed to diagnose his deteriorating condition in a timely or adequate manner, during the last ten days of August, 1992;[21/] (3) on the day of John T.'s death, STS staff failed to recognize that he had lapsed into unconsciousness for several hours[22/] (4) Dr. Guevarra failed to question why John T. was receiving an extraordinarily high dosage of Dilantin (three times as high as his normal dose);[23/] (5) Dr. Guevarra failed to check John T.'s blood to determine whether he was carrying a toxic level of Dilantin ;[24/] (6) Dr. Guevarra did not provide clearly defined orders regarding John T.'s medicine prescription;[25/] (7) Dr. Guevarra prescribed a 'cocktail of

[20/] Report on John T. by Dr. Rene Jahiel, STS Medical Director, at I (hereinafter "Jahiel Report").

[21/] Id.

[22/] Id.

[23/] Dr. Jahiel stated that a "thorough review and investigation on arrival should have revealed the excessive dosage of [D]ilantin and may have clarified the pathological processes ongoing in this patient, including the cause of his apparently severe pain." (Jahiel Report at 6.)

[24/] Aquino Memo at 4.

[25/] Dr. Guevarra ordered that John T. receive Demerol for "severe pain," Ativan for "agitation," and Tylenol for "mild pain." However, Dr. Guevarra did not clearly define what constitutes the respective levels of pain.

medications' without regard to the detrimental effects of ordering multiple medications.[26/]

As shown above, STS's care of John T. was plagued with appalling examples of insufficient medical care, and such systemic inadequacies might be sufficient alone to find the Def endants in contempt of the Remedial Orders. However, the court will discuss several additional examples below.

STS's maintenance of its active and inactive problem lists is inadequate. Active and inactive problem lists are a crucial part of effective medical care. Report of Karen Green McGowan at 4 [hereinafter "McGowan Report"]. Problem lists provide an accurate picture of a patient's current and past health history. (Id.) Furthermore, such lists are very useful to medical consultants, and when STS refers a patient to a new physician. (Id.) Conversely, problem lists are utterly useless if they are not accurate. At STS, most of the patients that the experts observed had problem lists. However, the majority of the lists reviewed

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Consequently, the amount of medicine given was left open to interpretation, and thus unpredictable. Id.

26/ Dr. Guevarra did not consider, nor did he alert his nursing staff to, the possibility that such a mixture could result in restlessness, insomnia, and self-abusive behavior. Consequently, when John T. exhibited such behaviors, they "were all regarded signs of pain and . . . due to [Dr. Guevarra's] initial oversight that failed to consider the potential deleterious effect of the cocktail of medications, the possibility that unusual behavior... could represent toxicity was never considered." As a result, the administering of medications never ended. Id.

were either incomplete or inaccurate.[27] (McGowan Report at 4.)

STS's recordkeeping procedures are also below professional standards, causing important medical information to be obscured, and jeopardizing its residents' health. Ms. McGowan found that STS was attempting to maintain the residents' medical records. Nevertheless, she explained that it took her from one and one-half to two hours per client to retrieve information in the client's record, because there was "[t]oo much crucial information in too many places, much of which [was] either incomplete, repetitive or inconsistent." (McGowan Report at 3.) Also, the HCFA's report cited several cases of primary care physicians altering

[27] Ms. McGowan reviewed eight lists and found that seven of them were either incomplete or inaccurate. (McGowan Report at 4.) Dr. James Walker stated that the "medical records problem lists are not current and progress notes do not indicate the problem being addressed, making review cumbersome and open to oversight. This problem is multiplied by the number of diciplines using the progress notes." Report of Dr. James E.C. Walker at 1 (hereinafter "Walker Report"). Moreover, a Quality Assurance Review Summary completed by an STS medical staff member revealed the following:

> [I]n twenty-five percent of cases, all significant past illnesses were not listed and... diagnostic procedures were not listed in about thirty-three percent of the active problem lists. In regard to health case unit admissions, ten to twelve percent of residents did not have daily progress notes for at least the first three days after admission.

(Pl. Ex. 4 at 25.) See also, Pl. Ex. 4 at 8, 9, 26-27 (Dr. Wachtel cites other findings of poor problem lists).

patients' medication without informing the interdisciplinary team, and patients' medication records not accurately reflecting the actual dosage of medication that the patients were receiving.[28/]

Even when medical concerns were properly listed in a patient record, STS often failed to follow-up with the appropriate medical care. For example, in several instances, medical records indicated that patients were experiencing significant weight loss, but STS failed to take action.[29/] (McGowan Report at 11; Pl. Ex. 4 at 14, 15, 16, and 21.) On other occasions, patients were diagnosed as having serious illnesses, but inadequate medical action was taken. (Pl. Ex. 4 at 13.)

Dr. Volkmar noted that STS's system for prescribing medication was at times "very complicated," and had "possible medical-legal implications." (Volkmar Report at 7-8.) He explained that there were at least six participants involved in any transaction related to medication, which at times decreased the quality of patient care. The participants included: (1) the client, (2) his/her parent or guardian, (3) the psychiatrist, (4) the primary care (prescribing) physician, (5) the treatment team, and (6) the program review

[28/] Client #02's medical records showed that, as of December 13, 1994, he was receiving ten mg. of Pindolol daily, when, in actuality, he had been receiving fifteen mg. daily for nearly a month. In another case, Client #03's primary care physician Increased his dosage of Tranxene from three to four times a day, but the increase was not reflected in Client #03's medical records for over three months. (Pl. Ex. 19, HCFA 26 Colony Ct. Circle Survey at 6.)

[29/] Ms. McGowan noted that unplanned weight loss in an environment like STS is almost always indicative of other health issues. (McGowan Report at 11.)

committee (the "PRC") "which functioned as the final arbiter for medication decisions." (Volkmar Report at 7.) Dr. Volkmar explained that, although the rationale behind such an elaborate process was to ensure quality care, the process "appeared, at times, to have the opposite effect in that quality of care was potentially worsened." (Volkmar Report at 7.)

He described one instance in which an elderly patient's psychiatrist requested that the patient's tranquilizing medication be changed in light of his Parkinsonian symptoms. However, the PRC not only disapproved of the psychiatrist's request, but also "preapproved" a virtually opposite request of increasing patient's current medication. Dr. Volkmar stated that "as far as could be determined no member of the PRC had ever seen the patient and ... with the exception of a single physician on the PRC (who presumably was not paying attention) other members would essentially not have been aware of the issues involved." (Id.)

Dr. Volkmar concluded that:

> The implications of unqualified (e.g., unlicensed) personnel, in effect, making major decisions regarding pharmacological interventions is problematic. The use, as in the case noted above, of "preapproval" of certain drug regimens by PRC is (presumably) theoretically intended to shorten the review process; it has the most unfortunate effect of undercutting the relationships of the physician and his/her patient by well meaning in

> dividuals who basically do not know the patient... (This practice) appeared to cross the boundary of acceptable practice.

(Volkmar Report at 7-8. See also Pl. Ex. 4 at 10.)

C. Physical Therapy Services

The Remedial orders require that STS provide adequate physical therapy services for those residents in need of such services. Adequate physical therapy is critical at an institution such as it serves to prevent physical degeneration, body deformities, and abnormal growth.[30/]

[30/] The Remedial Orders mandate the following: Consent Decree § V(4)(procedures shall be used to "reasonably ensure that there is consultation and communication of relevant information between and among personnel regarding residents' care, training needs and priorities . . . and that such information is communicated to staff who provide care for that resident"); Consent Decree § V(5) (mandates that record keeping systems, policies, and procedures with respect to each patient's care, medical treatment, and required training be utilized to maintain and make available in each resident's record such information as is professionally necessary to permit the exercise of professional judgment in that resident's care, medical treatment, and training); Consent Decree § V(6) (requires that measures be taken "to provide adequate medical care, including evaluation of residents with physical disabilities, and the specific steps that will be undertaken to provide appropriate medical and physical therapy services to prevent contractures, physical degeneration, and inappropriate body growth and deformity"); 1990 Court order § l(F) (requires the Defendants to provide "appropriate physical therapy to each resident with physical handicaps for whom a program of physical therapy has been ordered by a qualified professional, and ensure records of such treatment are made and entered in the resident's medical record"); and 1990 Court Order § I(G) (requires the Defendants to have a qualified

At the hearing, and in-her report, (Pl. Ex. 8), Ms. Harryman revealed clearly that, as of her inspection on November 15-17, 1993, STS's physical therapy services had a plethora of deficiencies that violated the Remedial Orders. Indeed, she found that nearly every aspect of STS's physical therapy services was below professional standards. Ms. Harryman opined that STS's grossly inadequate staffing was the primary cause of its poor physical therapy services. She explained that, in 1993, a mere seventeen of the 244 residents receiving physical therapy services were receiving assistance from licensed physical therapists ("PT"). The remaining residents were forced to receive training from unlicensed rehabilitation therapy assistants ("RTA"). She concluded that such staffing "precludes residents in need of physical therapy from receiving adequate care." (Pl. Ex. 8 at 4.) STS has, however, taken steps to remedy this deficiency.[31/]

Although licensed PTs planned the services that the RTAs administered, STS did not have objective guidelines

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physician assess each physically disabled resident "to determine whether a physical therapy program should be initiated or an existing physical therapy program modified to prevent contractures, physical degeneration, and inappropriate body growth and deformity." The physician is then required to refer those residents in need to a registered physical therapist. Within forty-five days from such referral, the physical therapist is required to "'assess and evaluate each resident so referred and develop a written physical therapy program for each of them.").

31/ DMR entered into a two-year contract, effective from August 25, 1995, for the provision of 240 hours per week of physical therapy, speech/language therapy, and occupational therapy services, the equivalent of six full-time positions.

for monitoring the delivery of physical therapy services, or an established methodology for documenting procedure implementation. Consequently, the RTAs and direct care staff often provided physical therapy services without the requisite guidance. (PI. Ex. 8 at 4.) Furthermore, STS's training procedures did not provide guidelines for determining staff competence prior to allowing such staff to administer physical therapy services. As a result, residents were in danger of receiving physical therapy from incompetent personnel.[32/] (Id.)

While STS has guidelines and procedures for determining when implementation and/or termination of physical therapy is appropriate, it fails to implement them consistently. At the hearing, Ms. Harryman testified that STS has a procedure for evaluating residents which consists of eight components. However,when she reviewed ten STS physical therapy evaluations, she found that only 36% of the required components were covered in all of the evaluations. (Pl. Ex. 8 at 6.) Further, few of STS's evaluations included goals regarding physical therapy treatment. Thus., it is clear that STS's staff was not assessing the effectiveness

[32/] Indeed, Ms. Harryman found that a "severe systemic problem at STS is that indirect physical therapy services... are implemented by people who are not adequately trained on a regular basis and who do not carry out adequate physical therapy treatment." (Pl. Ex. 8 at 4.) Ms. Harryman reviewed a videotape which STS uses to train RTAs, and found it to be cursory and incapable of providing sufficient information to ensure safe and appropriate delivery of physical therapy. (Pl. Ex. 8 at 9.) Moreover, Ms. Harryman observed two RTAs implementing physical therapy, and, in both instances, the RTA's procedifres were administered incorrectly, thereby placing the resident in risk of physical maladies (i.e., contractures, deformity, musculoskeletal injury). (Pl Ex. 8 at 7-8.)

of its physical therapy services, or modifying such services, when appropriate. This deficiency placed the patients at risk of receiving ineffective, useless, and detrimental therapy.[33/] In fact, STS's inadequate physical therapy services have caused several residents who, only a few years earlier, were ambulatory, to permanently bed-ridden.

Finally, STS fails to make effective use of its general physical therapy protocols.[34/] Professional standards require that "all physical therapy protocols be dated and reviewed regularly." (Pl. Ex. 8 at 7.) A review of STS's general physical therapy protocols evinced that STS had failed to document or make any additions or revisions to any of its general protocol reviews in nearly one and a half years. Further, in some instances, protocols were not available for patients at all. (Pl. Ex. 8 at 7.)

C. RULING ON CONTEMPT AND REMEDIES

The court finds by clear and convincing evidence that the Defendants are in contempt of the Remedial Orders.[35/] Although STS's quarterly reports reveal that it

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33/ Also STS's procedures do not provide for annual physical therapy assessments of clients. This, too, prevents STS from determining the effectiveness of its services. Ms. Harryman opined that "[r]e-evaluation on less than an annual basis is not adequate for any client receiving physical therapy services, which is a major concern in a facility where multiply handicapped residents receive primary therapy services from unlicensed and minimally trained personnel." (Pl. Ex. 8 at 5.)

34/ A protocol is a detailed plan of physical therapy treatment or procedure.

35/ The court notes that some of the most compelling evidence came from the Defendants own experts.

was in compliance with over 90% of the Remedial Orders' requirements,[36/] such "compliance" was not effectuating the Remedial Orders' desired results. Indeed, STS's systemic flaws have caused many residents to suffer grave harm, and, in several instances, death.

To insure that the Remedial Orders' purposes are satisfied in the future, the court will appoint a special master to review STS's operations. It is well settled in the law that federal courts have the inherent power to appoint an agent to oversee the implementation of its consent decrees. In re Peterson, 253 U.S. 300, 312-13 (1920). Indeed, this court has an affirmative duty to protect the integrity of its decree. This duty arises where the performance of one party threatens to frustrate the purpose of the decree." Berger v. Heckler, 771 F.2d 1556, 1568, (2d Cir. 1985) (emphasis added) (quoting Stotts v. Memphis Fire Dept., 679 F.2d 541, 555 (6th cir. 1982), rev'd on other grounds sub non., Fire-fighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (footnote omitted)).

While Federal Rule of Civil Procedure 53(b) requires that the appointment of a special master be the

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[36/] The court does not agree with the Plaintiffis contention that the compliance reports are not pertinent to the instant matter. Rather, the court finds the compliance reports to be a suitable starting point in determining whether the Defendants are complying with the Remedial orders. Moreover, the court notes that the Plaintiff consented to the Defendants, submission of .compliance reports, (Consent Decree § V), and, heretofore, had never contested the appropriateness of the court using such reports as a measure of compliance. Thus, the court will not permit the Plaintiff to contest the validity of the compliance reports at this time.

exception rather than the rule, it does not "terminate or modify the district court's inherent equitable power to appoint a person . . . to assist it in administering a remedy." Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982). Rather, "[b]eyond the provisions of [Fed.R.Civ.P.53] for appointing and making references to Masters, a federal district court has the inherent power to supply itself with [a special master] for the administration of justice when deemed by it essential. Id. at 1161 n.240 (citing Schwimmer v. U.S., 232 F.2d 855, 865 (8th Cir.), cert. denied, 352 U.S. 833 (1956) (citation omitted)). See also, Juan v. Weicker, 37 F.3d 874, 876 (2d Cir. 1994) (court appointed a monitoring panel, and later a single monitor, to oversee consent decree, "because of the difficult issues involved, as well as the importance to the plaintiff class enforcing the decree."); Berger v. Heckler, 771 F.2d at 1568 (holding that court's desire to protect the integrity of its decree "justifies any reasonable action taken by the court to secure compliance."); Stone v. San Fransisco, 968 F.2d 850 (9th Cir. 1992) (stating that district courts are permitted to appoint a special master to oversee a consent decree); Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421, 482 (1986) (Court recognized the "difficulties inherent in monitoring compliance with the court's orders," and, thus, found the appointment of an administrator "well within the District Court's discretion."); Kendrick v. Bland, 740 F.2d 432, 438 (6th Cir. 1984) (holding that a court may appoint a "monitor to observe defendants' conduct and thereby permit the federal court to oversee compliance with its continuing order.").

An appellate court will not disturb a district court's decision to appoint a special master, unless a clear abuse of judicial power is shown. Further, deference to the district court's exercise of discretion is heightened where, as here,

the court has been overseeing a large, public institution for a long period of time. Stone, 968 F.2d at 856 (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)). See also, Hutto v. Finney, 437 U.S. 678, 688 (1978) (Court gave substantial deference to district court's years of experience overseeing prison system).

In the instant case, the court finds that the complex nature of the case, together with the delicate interests of STS's residents, call for the appointment of a special master to determine why STS's efforts are not producing the Remedial Orders' intended results, and to make recommendations to the court. In addition, if the special master deems it necessary, the court will appoint an expert review panel, comprised of one expert in each of the three areas discussed above, to assist the special master in making findings and recommendations. The special master shall take the following actions: (1) conduct an immediate and thorough review of all aspects of STS's care and treatment of residents covered by the Remedial Orders to determine the changes needed to meet the Orders' desired ends; (2) formulate specific methods to implement the required changes; and (3) work with the parties to effectuate those changes.

The Plaintiff and Defendants shall report to the court, either jointly or severally, their recommendation(s) for appointment as special master on or before July 15, 1996. The court shall make the final determination.

SO ORDERED.

ELLEN BREE BURNS, SENIOR JUDGE

UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut, this 18th day of June, 1996.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
	:	Civil Action No.
v.	:	N-86-252 (EBB)
STATE OF CONNECTICUT, et al.,	:	
Defendants	:	

ORDER OF REFERENCE

In accordance with this Court's Ruling of June 19, 1996,[1/] this Court's Order of July 15, 1997,[2/] and with the

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1/ In the June 19, 1996 Ruling on Plaintiff's Application for an Order to Show Cause Why Defendants Should Not Be Held in Civil Contempt, this Court found:

> the complex nature of the case, together with the delicate interests of [Southbury Training School's] residents, call for the appointment of a special master to determine why [Southbury Training School's] efforts are not producing the Remedial Orders' intended results, and to make recommendations to the court.

(June 19, 1996 Ruling at 24.)

agreement of the parties, it is hereby ordered that the Special Master, David Ferleger, Esq., shall have the responsibilities and powers set forth in the following paragraphs of this Order of Reference.

Appointment and Mandate

1. David Ferleger, Esq. is appointed Special Master to a term beginning on the date of this Order to July 31, 1998, unless otherwise extended by order of this Court.

2. The Special Master shall act in his professional capacity as an agent and officer of this Court and shall serve this Court and the interests of justice. All parties shall cooperate fully with the Special Master.

3. The Special Master shall exercise all the power and authority granted under Federal Rule of Civil Procedure 53, and by this Order, and he shall take all appropriate actions to fulfill the orders of the Court and to monitor, aid, facilitate, oversee and report on compliance and implementation, and to ensure enforcement of the December 22, 1986 Consent Decree, the July 22, 1988 Order (adopting implementation plan and modifying Consent Decree regarding direct care staff ratios), the April 24, 1990 Order, the December 9, 1991 Order, the June 19, 1996 Contempt Ruling, and any future orders or recommendations adopted under this order of reference (hereafter, "orders of the Court").

4. As set forth in the June 19, 1996 Ruling, the Special Master is directed to:

> (1) conduct an immediate and thorough review of all aspects of [Southbury Training School's] care and treatment of residents covered by the Remedial Orders to determine the changes

[2/] In the July 15, 1997 Order, this Court, pursuant to Rule 53 of the Federal Rules of Civil Procedure and the Court's inherent powers, appointed David Ferleger, Esq. to serve as the Special Master in this case.

needed to meet the Orders' desired ends; (2) formulate specific methods to implement the required changes; and (3) work with the parties to effectuate those changes.

(June 19, 1996 Ruling at 24-25.) It is for the purpose of implementing that June 19, 1996 mandate that this Order of Reference is entered.

Compliance Review and Reporting, Remedy and Exit Criteria

5. The Special Master's duties and powers include:

A. to examine in detail and to evaluate Defendants' compliance with the orders of the Court, including the issues on which the Court found Defendants in contempt in the June 19, 1996 Contempt Ruling and to report to the Court with recommendations,

B. to develop on or before November 15, 1997 a recommended remedial plan or plans (using such input from consultants, experts, the parties and others as the Special Master deems appropriate) in order to fully effectuate and to ensure Defendants' compliance with the orders of the Court, and to recommend fair and effective remedies for the residents of Southbury Training School for any deficiencies in Defendants' compliance with the orders of the Court. At the Special Master's request, and for good cause shown, the date for the plan(s) may be extended upon approval of the Court. In developing the remedial plan(s), the Special Master shall to the extent possible:

1) develop specific and measurable criteria for compliance for those areas in which there is or may be dispute regarding compliance,

2) encourage and allow the Defendants in the first instance to develop and propose remedies and criteria for compliance, should Defendants desire to do so,

3) include "exit criteria," namely, criteria the satisfaction of which will enable the Court to end its active oversight of compliance and to discharge the Special Master.

C. to supervise implementation by Defendants of the orders of the Court and of any supplemental remedial orders;

D. to report periodically, and at least quarterly, to this Court regarding Defendants' compliance with the orders of the Court, and to recommend to this Court such modifications and alterations in the remedial orders or plans as appear necessary and proper.

6. The Special Master shall advise the Defendants and its agendas and officials responsible for implementation and assist them to develop and implement plans to achieve compliance, and to overcome obstacles to compliance, and to insure that the Southbury Training School residents receive mandated protections, procedures and services.

Powers of the Special Master

7. Specifically, and not by way of limitation of his powers, the Special Master shall have:

A. complete and unrestricted access to the facilities of Southbury Training School, the Defendants' offices, all agencies or entities serving or proposed to serve residents of Southbury Training School, including unrestricted access to all records, files, reports, memoranda, correspondence, plans, notices, budgets, compliance reviews and other documents relevant to the Special Master's duties;

B. authority to conduct, at reasonable times and places, confidential interviews with persons who he believes have information that will assist him in performing his duties, including Defendants' employees, agents and staff and those of their provider agencies and contractors (with respect to whom Defendants are ordered to use their best efforts to encourage the full cooperation of such persons), and counsel for the parties, parents, guardians, advocates and residents or clients of agencies or other entities serving or proposed to serve-residents of Southbury Training School;

C. authority to attend any formal institutional meetings or proceedings conducted by Defendants regarding subject matters relevant to his duties;

D. authority to require written reports from any of Defendants' employees, agents, staff or attorneys with respect to compliance with the orders of the Court;

E. authority to conduct hearings (with proper notice to the parties) on implementation of and compliance with the orders of the Court, to which end the Special Master (a) shall have the power to require the attendance of witnesses, including Defendants' employees, agents and staff, and (b) shall exercise all other powers described in Federal Rule of Civil Procedure 53(c);

F. ex parte access to this Court without prior notice to or consultation with the parties. The Special Master shall have the right to confer and conduct working sessions informally and on an ex parte basis with the parties on matters affecting compliance;

G. review and comment on documents, plans, policies and procedures prepared by Defendants to implement the orders of the Court, prior to their execution or formal submission by the Defendants; and

H. authority to make informal suggestions to the parties in whatever form the Master deems appropriate in order to facilitate and aid compliance with the orders of the Court.

8. All actions of the Special Master, experts, consultants and members of his staff will be under the direct control and supervision of this Court. The Special Master and his experts, consultants and staff members shall not -be empowered to direct the Defendants or any of Defendants' personnel to take or to refrain from taking any specific action to achieve compliance. Sole power to direct compliance and to punish noncompliance remains with this Court, although the Special Master may make such recommendations as he deems necessary and as may be based upon input from his experts, consultants, or staff members, to direct compliance or punish non-compliance.

Recommendations by the Special Master

8. The Special Master shall have the authority, after consultation with the parties, to make formal recommendations with regard to implementation of the orders of the Court. Such recommendations will include, when necessary, timetables for implementation or measures necessary to bring the Defendants into compliance, or to overcome obstacles to compliance. Copies of each recommendation will be filed with this Court and served upon the parties. All parties shall be bound by the recommendation unless, within fifteen (15) business days, one of the parties files an objection with this Court and requests a hearing. The hearing on the objections will be held at the earliest convenient time after notice to all parties; such hearing may be on the papers or evidentiary as the Court may deem appropriate.

Recommendations of the Master may be used as evidence in Court. If the Special Master makes recommendations as a result of a hearing under Federal Rule of Civil Procedure 53, he shall file with the Court a report with findings of fact and conclusions of law, and said report shall be considered under the procedures and standards of Rule 53.

Mediation

9. The Special Master is empowered to recommend resolution of disputes to the parties. Such recommended resolutions shall take the form of formal recommendations and shall be governed by the procedure set forth above.

Staff and Review Panel

10. The Special Master shall have the authority to employ all necessary administrative, clerical and support staff within the budget approved by the Court. All such persons, as well as the amount of their compensation, shall be approved by this Court in advance of their employment. In addition, the Special Master, after consultation with the parties and with the approval of the Court, may retain members of an expert review panel as consultants, as described in the June 19, 1996 Contempt Ruling or other necessary consultants, to assist him in fulfilling the duties and responsibilities assigned to him by tills Order. The staff and consultants of the Special Master shall have whatever access to staff, records, persons, records, facilities or sites of services that the Special Master has and that the Special Master believes is necessary to fulfill the staff, expert or consultant role.

Costs and Payment Process

11. Defendants shall pay the Special Master a reasonable fee, plus expenses, to be set by this Court, but not to exceed $216,000 for the year of this appointment, including the cost of the expert review panel, and Defendants in addition shall provide the Special Master during his visits on-site in Connecticut with such office space, equipment and support personnel that he, his staff and his agents may reasonably require in Connecticut.

12. The Special Master shall submit a statement to the Court approximately monthly for approval of his fees and expenses with copies to counsel for both parties. The statement shall contain a signature line for the Court accompanied by the statement, "Approved for Disbursement." Objections to the statement shall be filed within ten (10) days of filing of the statement. Hearings thereon shall be at the discretion of the Court. Any sum approved by the Court shall be paid within fifteen (15) days unless otherwise ordered or agreed upon.

13. The Special Master shall keep a complete record of all of his fees and expenses, which shall be made available at the Court's or the parties' request for their inspection. Any party which does not object to a fee statement within ten (10) days of its submission shall be deemed to have waived any objection permanently.

14. Within ten (10) days of the date of this Order, the Defendants shall deposit with the Clerk of Court, United States District Court for the District of Connecticut, to the Clerk's Registry Account, a sum in the amount of $18,000 representing one-twelfth of the Special Master's estimated annual budget. On or before thirty (30) days of the date of this Order, and on or before the first day of each

succeeding month thereafter, Defendants shall submit a sum in the amount of $18,000 to the Clerk, representing one-twelfth of the estimated annual budget of the Special Master. All deposits made by Defendants shall be placed by the Clerk of Court in an interest-bearing account. Any monies on deposit with the Clerk of Court that are unspent in a given month shall be carried over and applied to pay for future fees and expenses of the Special Master. The Clerk is directed that the account shall not be subject to the Registry surcharge.

15. At such point as the Court determines that the Special Master's duties are completed, surplus funds on deposit with the Clerk's Office will be refunded pro rata to the defendants; however, if the Court determines at any time that the Special Master will require supplemental funds, the Court may so order the Defendants to make additional deposits.

SO ORDERED.

ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut, this
15th day of July, 1997.

28 U.S.C. § 1291. Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and 1295 of this title.

(2)

FILED

NOV 18 1997

CLERK

No. 97-485

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether a district court order holding a defendant in civil contempt and stating the court's intention to appoint a special master is a final, appealable order under 28 U.S.C. 1291, or immediately appealable under the collateral order doctrine.

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STATE OF CONNECTICUT, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 116 F.3d 466 (Table). The opinion of the district court is reported at 931 F. Supp. 974 (D. Conn. 1996).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1997. The petition for a writ of certiorari was filed on September 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioners erroneously cite (Pet. 2) 28 U.S.C. 1281(1) as the basis for this Court's jurisdiction.

STATEMENT

1. In September 1985, the United States brought this action against the State of Connecticut, its Governor, the Commissioner of the Department of Mental Retardation, and the Director of the Southbury Training School, pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.* Pet. App. A7. The complaint alleged unconstitutional conditions of confinement at Southbury, an institution for persons with developmental disabilities. Pet. App. A3. The parties entered into a consent decree to remedy the unconstitutional conditions at Southbury, which the district court approved on December 22, 1986. Petitioners proposed a detailed plan to implement the decree's requirements, which the district court approved and entered as a remedial order on July 22, 1988. *Ibid.* The parties stipulated to two additional remedial orders to address continuing deficiencies at Southbury in April 1990 and December 1991. *Id.* at A3-A4.

These remedial orders impose requirements on petitioners to ensure that Southbury residents receive psychological services, medical care, and physical therapy that are administered pursuant to the exercise of professional judgment by qualified professionals. Pet. App. A10, A19 n.18, A25 n.30. For instance, petitioners are required to: (1) protect Southbury residents from unreasonable risks to personal safety by developing for each resident an overall plan of services that addresses behavior management and teaches necessary self-care skills (Pet. App. A10-A14); (2) have an interdisciplinary team review the overall plan of services for Southbury residents to determine if the training programs are appropriate

and to modify the training programs when necessary (*id.* at A10-A11 n.5); (3) implement policies and procedures to ensure that behavior modification medications are administered safely and not in lieu of behavioral training programs (*ibid.*); and (4) have a qualified physician "determine whether a physical therapy program should be initiated or an existing physical therapy program modified to prevent contractures, physical degeneration, and inappropriate body growth and deformity," and refer Southbury residents to a "registered physical therapist" as appropriate (*id.* at A25-A26 n.30).

2. After learning that petitioners repeatedly and systematically had failed to meet the requirements of the remedial orders, the United States in April 1995 filed an application for an order to show cause why petitioners should not be held in civil contempt. Pet. 3; Pet. App. A4. After a four-day evidentiary hearing, in June of 1996 the district court found, by clear and convincing evidence, that petitioners were in civil contempt. Pet. App. A28. In its lengthy opinion, the district court found that petitioners had violated the orders by failing to provide required psychological care (Pet. App. A10-A18), requisite medical care (*id.* at A19-A25), and necessary physical therapy services (*id.* at A25-A28). Southbury's "systemic flaws," the district court concluded, "have caused many residents to suffer grave harm, and in several instances, death." *Id.* at A29.[2]

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[2] In one instance, a Southbury resident burned to death while smoking after petitioners failed to implement a plan designed to prevent him from "burn[ing] holes in his clothing" or otherwise injuring himself with his "sloppy" smoking habits. Pet. App. A12-A13. Other Southbury residents were permitted to ingest dangerous substances despite a known propensity for

After weighing "the complex nature of the case, together with the delicate interests of [Southbury]'s residents," the district court found that it would be necessary to appoint "a special master to determine why [Southbury]'s efforts are not producing the Remedial Orders' intended results, and to make recommendations to the court." Pet. App. A31. The district court did not, however, appoint the special master in its June 1996 order.

3. Petitioners appealed, asserting that 28 U.S.C. 1291 and the collateral order doctrine provided the court of appeals with jurisdiction.

In an unpublished opinion, the court of appeals disagreed and dismissed the appeal. The court explained that, under 28 U.S.C. 1291, it has jurisdiction over only final decisions. "[A] finding of contempt unaccompanied by sanctions," it continued, "is not final and thus cannot support an appeal." Pet. App. A4 (citations omitted). The Court further rejected any suggestion that the appointment of a special master rendered the order appealable, because an "order referring a matter to a special master is not a final order appealable under 28 U.S.C. 1291." *Id.* at A4 (citations omitted). The court therefore concluded that "the district court's ruling in this case—finding defendants in contempt, imposing no sanctions, and stating the intent to appoint a special master—is not an appealable final decision. Nor does the court's

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so doing, *id.* at A14, were not properly treated for medical conditions or were over-medicated for their conditions, possibly contributing toward another death, *id.* at A19-A20, or were rendered "permanently bed-ridden" by petitioners' "inadequate physical therapy services," despite having been "ambulatory" just a few years earlier, *id.* at A28.

order qualify as an appealable order under the collateral order doctrine." *Id.* at A4-A5.

4. Shortly after petitioners' appeal was dismissed, the district court in July 1997 issued an order of reference in which it appointed a special master and set forth the special master's responsibilities, duties, and authority. Pet. App. A33-A38. Petitioners did not appeal that order. To the contrary, they consented to it. Pet App. A33-A34 (order entered "with the agreement of the parties").

ARGUMENT

Contrary to petitioners' contentions, the court of appeals' decision raises no issue warranting this Court's review. It raises no issue on which the courts of appeals are divided. It raises no issue of substantial national importance. And the primary contentions petitioners press in support of certiorari —objections to the content of an unappealed July 1997 reference order—are not now properly before the Court in any event.

1. Petitioners first argue (Pet. 5-8) that the district court's decision to appoint a special master was final and immediately appealable under 28 U.S.C. 1291.

As "a general rule a district court's decision is appealable under [28 U.S.C. 1291] only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 275 (1988) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). This is true for post-judgment proceedings as well. See 15B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3916, at 349 (2d ed. 1992) ("[a]ppeal ordinarily should not be available as to any particular post-judgment

proceeding before the trial court has reached its final disposition").

The court of appeals properly held that, because an order appointing a special master is not final and therefore not immediately appealable under Section 1291, the June 1996 order stating *an intent* to appoint a special master was not final and thus not immediately appealable either. Pet. App. A3-A5. Petitioners do not dispute that, under normal circumstances, this holding would be entirely correct. See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290-291 & n.4 (1940); see also *George* v. *Victor Talking Machine Co.*, 293 U.S. 377 (1934). Nonetheless, petitioners argue that the appointment of a special master in this case is objectionable—and thus must be immediately appealable—because it "will be highly intrusive on state sovereignty and the ability of state officials to exercise their wide discretion, within constitutional bounds, in operating a state institution." Pet. 6; see Pet. 5-8. In particular, petitioners object to the special master's access to their documents and facilities, Pet. 6, to the special master's obligation to make specific recommendations for reform, *ibid.*, and to their obligation to pay the special master's reasonable costs, *ibid.* See also Pet. 14, 15, 18 (arguing about the alleged intrusion on state sovereignty).

These claims are not properly before the Court. The June 1996 order that petitioners appealed, and that is at issue in this petition, did not appoint a special master. Nor did it set forth his authority and duties. It merely "stated the [district] court's intent to appoint a special master." Pet. App. 4; see also *ibid.* (district court has "not yet chosen a special master"). The special master was not appointed and the conditions to which petitioners now object as

unduly intrusive—including not just the special master's duties and powers but also petitioners' obligation to pay the master's reasonable expenses—were not established until the district court issued its July 1997 reference order, a year after petitioners sought appellate review. See *id.* at A33, A36-39, A40-A41 (reference order issued in July of 1997).

Petitioners, however, failed to seek review of the July 1997 reference order. To the contrary, they *agreed to it* before the district court. See Pet. App. A33-A34 (order entered "with the agreement of the parties"). Because petitioners failed to attempt to appeal from the July 1997 order that imposed the conditions to which they now object, their complaints about that order are not properly before the Court. Moreover, this Court rarely reviews on certiorari the contentions of a party where, as here, the courts below have not had the opportunity to rule on them first. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *DeShaney* v. *Winnebago Dep't of Social Servs.*, 489 U.S. 189, 195 & n.2 (1982); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

In any event, the decision of the court of appeals was correct. Even if petitioners' contention regarding excessive intrusion into state functions were correct—and, as explained below, it is not—that contention still does not render the otherwise non-final June 1996 order "final." As this Court has held, an order appointing a special master "is generally interlocutory and not appealable, at least if not for a mere ministerial purpose." *Deckert*, 311 U.S. at 290-291 & n.4; see also *George*, 293 U.S. 377 (order appointing master to give an accounting to the court is inter-

locutory and not appealable).[3] If an order that actually appoints a special master is generally non-final under Section 1291, then surely an order that, like the June 1996 order at issue here, merely states the district court's *intent* to appoint a special master at some undefined point in the future must be non-final as well. If petitioners believed that immediate review of that order was necessary and indispensable despite its lack of finality, they should have sought mandamus.[4] This they did not do.

Besides, petitioners' assertion that the "special master has sweeping authority under the District Court's order and will be heavily involved in the day-to-day operation and management of [Southbury]," Pet. 4, is simply incorrect. To the contrary, the district court's orders are carefully crafted to ensure that this does *not* occur. Neither the district court's June 1996 order nor the unappealed July 1997 order authorizes the special master to manage any operations of Southbury. Instead, in accordance with Federal Rule of Civil Procedure 53(c), the district court's reference order instructs the master to conduct a

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[3] Given the factual inquiry that the special master here must make, it cannot be said that the master was appointed for a ministerial purpose.

[4] A serious abuse of the referral power can be corrected on mandamus, as this Court and many others have held. See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256-259 (1957) (affirming use of mandamus to correct improper referral); *In re Bituminous Coal Operators' Ass'n, Inc.*, 949 F.2d 1165, 1167-1168 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (granting mandamus where scope of referral to special master exceeded proper bounds); *In re Pearson*, 990 F.2d 653, 656 (1st Cir. 1993) ("appointment of a master may be so far afield, and the potential for mischief so great in a particular situation, that immediate relief by way of mandamus is warranted").

limited, factual inquiry and to submit to the district court his findings and recommendations concerning what Southbury should do to comply with the remedial orders. Pet. App. A31, A36-A38.

Indeed, the district court's July 1997 reference order expressly provides that the "Special Master and his experts, consultants and staff members shall not be empowered to direct the Defendants or any of Defendants' personnel to take or refrain from taking any specific action to achieve compliance." Pet. App. A38. The order further clarifies that petitioners are to propose their own remedies to the greatest extent possible: The court's order specifically "encourage[s] and allow[s] the [petitioners] in the first instance to develop and propose remedies and criteria for compliance, should [petitioners] desire to do so." *Id.* at A36. And the order clearly retains for the district court and for the district court alone any and all authority to impose remedies. "Sole power to direct compliance and punish noncompliance remains with th[e]" district court. *Id.* at A38. Thus, the basis for petitioners' claimed need for immediate review—an allegedly improper intrusion into their operation of Southbury—simply does not exist.

2. Petitioners also argue (Pet. 11-12) that the June 1996 order was final because it found them in contempt. But the court of appeals correctly held (Pet. App. A4)—and petitioners appear to concede (see Pet. 17)—that a finding of contempt unaccompanied by sanctions ordinarily is not appealable as a final order. The courts of appeals repeatedly have so held. See, *e.g.*, *United States Steel* v. *Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269, 1273 (3d Cir. 1979); *Petroleos Mexicanos* v. *Crawford Enterprises*, 826 F.2d 392, 398 (5th Cir. 1987); *Motorola* v. *Computer Displays Int'l*,

739 F.2d 1149, 1154 (7th Cir. 1984); *Weyerhaeuser Co.* v. *Longshoremen's and Warehousemen's Union, Local 21*, 733 F.2d 645, 645-646 (9th Cir. 1984); *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051, 1053 n.7 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988).

Nonetheless, petitioners insist that there is a conflict among the circuits because other courts permit an immediate appeal "from a wide variety of post-judgment orders." Pet. 9, 10. In post-judgment proceedings, petitioners argue, an appellate court should be more flexible in determining whether a district court order is final under 28 U.S.C. 1291. *Ibid.*

None of the cases cited by petitioners, however, suggests that an order finding a party in civil contempt is final and appealable under 28 U.S.C. 1291 where the order, like the June 1996 order, fails to impose a sanction. To the contrary, the cases petitioners cite allow appeal not merely because the district court orders at issue adjudicate rights under consent decrees, but because those district court orders—unlike the district court order here—fully and finally adjudicate the matter by imposing a remedy as well.

Thus, contrary to petitioners' claims (Pet. 10), the district court order in *Kittitas Reclamation District* v. *Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1034, n.1 (9th Cir.), cert. denied, 474 U.S. 1032 (1985), did not merely interpret water rights under a decree, but also "ordered water released from a Yakima water project" based on the interpretation. 763 F.2d at 1033. Consequently, the court of appeals there had before it a final and appealable question: "whether the district court had authority to" impose

the remedy it chose, *i.e.* "to order the water released." *Ibid.* Nowhere does *Kittitas* suggest that the Ninth Circuit would permit immediate appeal of a contempt order that, like the June 1996 order at issue here, imposed no remedy and no sanction. To the contrary, it is established Ninth Circuit law that such an order is not final and thus not immediately appealable under Section 1291. *Weyerhaeuser*, 733 F.2d at 645 (order finding appellant "in contempt for continuing to violate a previous injunction" was "not a final order under 28 U.S.C. §1291" absent "the imposition of sanctions").

For the same reason, petitioners' reliance on *Walker* v. *United States Department of Housing and Urban Development*, 912 F.2d 819 (5th Cir. 1990), is also misplaced. There, the district court not only "interpret[ed] obligations under a consent decree," Pet. 10, but also—based on its interpretation of the decree—ordered relief by requiring the Department of Housing and Urban Development "to continue past levels of funding" for certain apartment units. *Walker*, 912 F.2d at 826; see also *id.* at 825. *Walker* does not suggest that a contempt order unaccompanied by relief (*i.e.*, an order of sanctions) can be appealed immediately under Section 1291. Quite the opposite: It is settled law in the Fifth Circuit, as it is in other circuits, that contempt orders that do not impose sanctions are not final and thus cannot support immediate appeal under Section 1291. *Petroleos Mexicanos*, 826 F.2d at 398 (contempt order final and appealable only if there is both "a finding of contempt" and a "sanction for contempt").

Apparently aware of this, petitioners contend that the court of appeals erred in holding that no sanction was imposed because the appointment of a special

master was meant to be a sanction. See Pet. 11-12; contrast Pet. App. A4 ("the district court imposed no sanctions"). That fact-bound contention mischaracterizes the district court's orders. Those orders do not state that the appointment of a special master would itself constitute the "sanction" for contempt. Rather, the court makes it clear that the special master would be appointed to assist the court in its own efforts to devise an appropriate remedy. As the district court explained, the role of the special master would be "to determine why [petitioners'] efforts are not producing the Remedial Orders' intended results, and to make recommendations" for a remedy "to the court," Pet. App. A31; the "sole power to * * * punish noncompliance," the district court specified, "remains with [the] court," Pet. App. A38.[5] The district court's order thus itself makes clear that the special master was not appointed as a sanction, but rather as a method of determining the appropriate remedy.[6]

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[5] The district court's order instructs the master to take the following actions: (1) conduct a review of Southbury's care and treatment of residents that are covered by the remedial orders to determine the changes needed to meet the orders' desired ends; (2) specify methods to implement the required changes; and (3) work with the parties to effectuate those changes. Pet. App. A31. Even after the master files his report, further litigation may take place, as Federal Rule of Civil Procedure 53(e) provides parties the opportunity to object to the master's findings and recommendations.

[6] Besides, the supposed "sanction" petitioners rely upon as making the June 1996 order "final"—the appointment of a special master—itself was not imposed until one year after the June 1996 order was entered. See Pet. App. A33-A41. Because the very "sanction" petitioners rely upon as making the June 1996 order "final" was not imposed until much later, it is hard

3. Alternatively, petitioners appear to argue that, whether or not the appointment of a special master was a sanction, the Court should grant certiorari to determine whether "a finding of contempt *combined with* the appointment of a special master, under the circumstances of this case" should be immediately appealable. Pet. 16.

Petitioners do not cite any other case raising this fact-bound question. Moreover, the question is not even presented by this case. The Court cannot decide whether combining the appointment of a special master with a finding of contempt renders an order "final," because the June 1996 order that petitioners appealed did not in fact appoint a special master. Instead, the special master was appointed almost a year later in a separate order. See pp. 6-7 & 12 n.6, *supra*; Pet. App. A4, A33.

Besides, petitioners' contention is meritless. If an order appointing a special master and an order holding a party in contempt (*sans* sanctions) are both interlocutory when entered separately, combining both into a single order does not in itself render them "final." Finality depends on the practical effect of the orders. Here, neither the June 1996 order nor the unappealed July 1997 order completely resolves the issues before the court—the cause of petitioners' contempt and the remedy for it remain open for consideration—and the allegedly intrusive effects that petitioners claim to fear are precluded by the terms of the orders in any event.

4. Finally, there is no merit to petitioners' challenge to the court of appeals' holding that the district

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to see how the June 1996 order could be anything but interlocutory and non-final.

court's order was not appealable under the collateral order doctrine. Indeed, petitioners' expansive view of the collateral order doctrine would swallow up the rule that orders of the type contested here are non-appealable interlocutory rulings.

Collateral orders must "'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). The June 1996 contempt order that petitioners appealed did not have these characteristics. It did not "conclusively" determine an issue, as the reasons for petitioners' contempt and the potential remedies therefor remain open for consideration by the district court after investigation by the special master.[7] Nor did the order address an issue that was "completely separate from the merits" of the action. To the contrary, the issue the order addressed—whether petitioners had complied with the district court's earlier remedial orders—is one of the central issues before the district court. And the decision will not be rendered "unreviewable" absent immediate appeal. When the district court imposes a remedy for petitioners' contempt, petitioners should be able to seek review not only of the remedy but of the underlying finding of

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[7] The June 1996 order did not even conclusively resolve any questions surrounding the appointment of a special master, as the district court did not appoint the special master and set forth his powers until it issued its July 1997 reference order (which is not properly before this Court). See pp. 6-7, *supra*.

contempt—as embodied in the district court's June 1996 order—as well.

Nonetheless, petitioners appear to argue that, even if private litigants would not be permitted to appeal under the collateral order doctrine, they as representatives of a state institution should be permitted to do so. See Pet. 13. That argument is not supported by *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), upon which petitioners' rely. There, the Court determined that orders denying claims of Eleventh Amendment immunity, like those denying claims of qualified immunity, should be immediately appealable. The Court reasoned that, because Eleventh Amendment immunity is an immunity "from suit"—immunity from "the costs and general consequences" of subjecting public officials to risk of discovery and trial—it would be forfeited if review of an order denying immunity could be obtained only after judgment on the merits. *Id.* at 143-144. Because petitioners here do not claim immunity from suit but merely assert substantive or procedural error that will be fully reviewable on appeal from a final judgment, *Puerto Rico Aqueduct* does not counsel application of the collateral order doctrine. See *id.* at 145 (If "the Eleventh Amendment does not confer immunity from suit, but merely a defense to liability," then "petitioner arguably would not be entitled to avail itself of the collateral order doctrine").[8]

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[8] Moreover, to the extent petitioners seek to rely on principles underlying the Eleventh Amendment such as state sovereignty, those claims are not properly before the Court. The conditions to which petitioners object as unduly intrusive into state functions were imposed not by the June 1996 order that petitioners appealed, but rather by the July 1997 order to which petitioners consented. See pp. 6-7 & 12 n.6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1997

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No. 97-485

In The
Supreme Court Of The United States
October Term, 1996

STATE OF CONNECTICUT, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF DEFENDANTS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners:

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ARGUMENT

The United States makes three principal arguments as to why the State of Connecticut's Petition for Writ of Certiorari in this case should not be granted. Each of these contentions is without merit and requires little additional discussion.

First, the United States argues that the State's fundamental concern regarding the special master's intrusion on the State's core sovereign functions is not before the Court. This claim is premised on the flawed notion that the State agreed to the appointment of the special master in a July 15, 1997 order of the trial court.

At the time the July 15, 1997 order was entered by the trial court, the period in which to seek rehearing before the court of appeals in this case had not run, nor had the time to seek review from this Court expired. In the case pending before the court of appeals--the State's appeal of the trial court's June 19, 1996 adjudication of contempt and appointment of a special master--the State of Connecticut directly challenged the appointment of the special master. To argue, therefore, that the State somehow waived its right to continue to challenge the appointment by agreeing to the entry of a subsequent order that (1) identified the individual who would actually serve as special master, and (2) more fully described his duties, is completely without merit.

The State of Connecticut merely agreed that, **provided** the issues relating to the adjudication of contempt and appointment of a special master could not be reviewed by a court of appeals until a later time, **as the United States had long asserted**, the case should be permitted to move forward. In the meantime, the State of Connecticut continued to pursue vigorously its objections to the adjudication of contempt and appointment of a special master in

the first instance by filing a Petition for Writ of Certiorari in this court.

For the United States to now argue that the State of Connecticut has consented to the substantial intrusions of the special master requires it to ignore both the context in which the July 15, 1997 ordered was entered and the arguments that the United States has made repeatedly in this case: that the substantial intrusion on state sovereignty that the State of Connecticut seeks to avoid cannot be reviewed until long after the intrusion has occurred and the State is without a remedy.

Second, the United States over and over asserts in its brief that the District Court did not appoint a special master in this case until long after the June, 1996 order from which the State appealed. The United States continues to assert this claim despite the fact that the plain language of the June, 1996 order sets forth the Court's decision to appoint a special master and explicitly details the actions which the special master must take. Nowhere in its Brief in Opposition does the United States do anything but merely restate its bald conclusion that the special master was not appointed until July, 1997. Again, it is clear that the latter order merely identified the individual who would serve as a special master and that the decision to appoint a special master occurred over a year prior to that order.

Finally, the United States also argues that the petition should not be granted because the State of Connecticut could have sought review of the June, 1996 order by way of mandamus. The cases relied upon by the United States in support of this claim are inapposite. None of the cases cited by the United States involved a decision of a trial court, as in this case, that qualified for appellate review either by way of appeal as a final decision or as an appealable interlocutory order under *Cohen v. Beneficial Indus. Loan*

Corp., 337 U.S. 541, 546 (1949). In the present case, because the June, 1996 order is a final decision, or, at the least, is an appealable interlocutory order, resort to the extraordinary remedy of mandamus was not required.

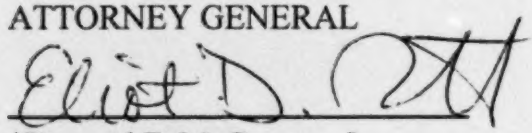
CONCLUSION

For all of the foregoing reasons, the petitioners assert that a writ of certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

STATE OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL



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